

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

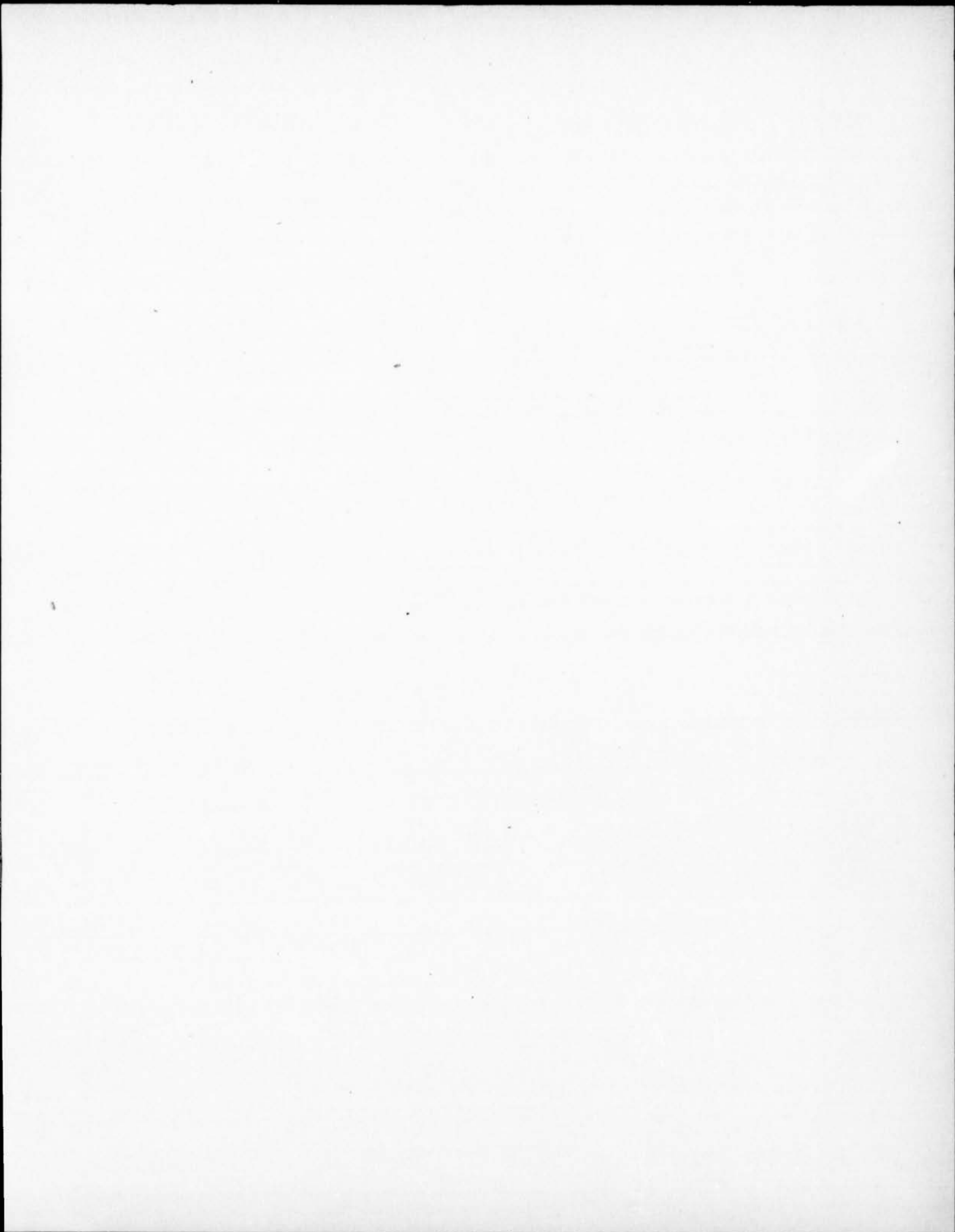
I N D E X

	<u>Page</u>
Statement of the Issue Presented -----	1
Statement of the Case -----	1
A. Administrative Proceedings -----	2
1. Summary -----	2
2. The Medical Evidence -----	3
3. Vocational and Other Non-Medical Evidence -----	5
4. The Administrative Decision -----	6
B. District Court Decision -----	8
Statute Involved -----	8
Argument:	
THE DISTRICT COURT CORRECTLY HELD THAT THE SECRETARY'S DECISION DENYING CLAIMANT DISABILITY BENEFITS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE. -----	8
A. Scope of Review -----	8
B. Standards of Disability Under the Social Security Act -----	9
C. The Secretary's Decision is Supported by Substantial Evidence. -----	12
Conclusion -----	16
Certificate of Service -----	17
Statutory Appendix -----	1a -2a
Addendum -----	1b -3b

C I T A T I O N S

Cases:

<u>Celebreeze v. O'Brient</u> , 323 F. 2d 989 (C.A. 5, 1963) -----	11
<u>Durham v. Gardner</u> , 392 F. 2d 168 (C.A. 5, 1968) -----	15
<u>Gold v. Secretary of HEW</u> , 463 F. 2d 38 (C.A. 2, 1972) -----	9,10,11
<u>Granger v. Finch</u> , 425 F. 2d 206 (C.A. 7, 1970) -----	13



Cases (continued):

	<u>Page</u>
<u>Franklin v. Secretary of HEW</u> , 393 F. 2d 640 (C.A. 2, 1968) -----	9
<u>Henry v. Gardner</u> , 381 F. 2d 191 (C.A. 6, 1967), certiorari denied, 389 U.S. 993, rehearing denied, 389 U.S. 1060 -	9
<u>Knex v. Finch</u> , 427 F. 2d 919 (C.A. 5, 1970) -----	14
<u>Levine v. Gardner</u> , 360 F. 2d 727 (C.A. 2, 1966) -----	9
<u>Moon v. Celebreeze</u> , 340 F. 2d 926 (C.A. 7, 1965) -----	9
<u>Peterson v. Gardner</u> , 391 F. 2d 208 (C.A. 2, 1965) -----	14
<u>Purdham v. Celebreeze</u> , 349 F. 2d 828 (C.A. 4, 1965) -----	14
<u>Reyes Robles v. Finch</u> , 409 F. 2d 84 (C.A. 1, 1969) -----	10,11,14
<u>Richardson v. Perales</u> , 402 U.S. 389 -----	13
<u>Ross v. Richardson</u> , 440 F. 2d 690 (C.A. 6, 1971) -----	9
<u>Sykes v. Finch</u> , 443 F. 2d 192 (C.A. 7, 1971) -----	13
<u>Underwood v. Ribicoff</u> , 298 F. 2d 850 (C.A. 4, 1962) -----	11
<u>Woods v. Finch</u> , 428 F. 2d 469 (C.A. 3, 1970) -----	15

Statute:

Social Security Act, 42 U.S.C. (1970 ed.)
401, et seq.:

42 U.S.C. 405(g) -----	1,8
42 U.S.C. 423(d)(1)(A) -----	10
42 U.S.C. 423(d)(2) -----	11
42 U.S.C. 423(d)(3) -----	10

Miscellaneous:

Page

H. R. Rep. No. 544, 90th Cong., 1st Sess., p. 30 (1967) -----	10,11,12
S. Rep. No. 744, 90th Cong., 1st Sess., p. 48 (1967), 1967 U.S. Code Cong. & Admin. News, 2834 -----	10

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1093

HAZEL CUTLER,

Plaintiff-Appellant,

v.

CASPAR W. WEINBERGER, Secretary of
Health, Education and Welfare,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE PRESENTED

Whether the district court correctly held that the Secretary's denial of social security disability benefits was supported by substantial evidence.

STATEMENT OF THE CASE

This action was commenced in the district court by claimant-appellant, Hazel Cutler, pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), to review the final decision of the Secretary of Health, Education and Welfare, denying claimant's application for disability benefits. The district court, "after consideration of the record, arguments, and applicable law, conclude[d]

that there was ample substantial evidence to justify the administrative determination" (App. 1b-3b). The court accordingly granted the Secretary's motion for judgment on the pleadings. ^{1/}

A. Administrative Proceedings

1. Summary

Claimant filed an application for disability insurance benefits on August 10, 1971, alleging that she became disabled in March, 1963, due to diabetes, dizziness, arthritis and an unsteady walk (Tr. 44-47). ^{2/} The Social Security Administration denied the claim initially, and upon reconsideration (Tr. 50, 53). A hearing was held before an administrative law judge (formerly hearing examiner) on October 6, 1972, at which claimant appeared and was assisted by a representative of the New York City Department of Social Services (Tr. 20-43). The administrative law judge found that claimant, who last met the insured status requirements of the Act on June 30, 1970, failed to establish that as of that date she had a disability of sufficient severity so as to preclude her from engaging in substantial

^{1/} For the convenience of the Court the district court's order is reproduced in the Addendum (Add.) to this brief.

^{2/} "Tr." refers to the transcript of the administrative proceeding. "Br." refers to the Brief for the Appellant.

gainful activity; and, that claimant, on or before the expiration of her insured status, had the residual capacity to perform her usual occupation (Tr. 14). Accordingly, the administrative law judge concluded that claimant was not disabled within the meaning of the Act (Tr. 14). The Appeals Council denied further review (Tr. 4).

2. The Medical Evidence

The medical evidence in this case consists primarily of reports of claimant's treatment at Queens General Hospital, Long Island Jewish Hospital, and the New York Diabetes Association, Inc.

The reports from Queens General Hospital pertain to claimant's hospitalization from May 10, 1965 to June 10, 1965, and subsequent outpatient treatment through June 30, 1969. A radiographic examination conducted on May 19, 1965 of claimant's chest was negative, but the examination of her abdomen revealed a pelvic mass most likely congenital in origin (Tr. 78). The electrocardiogram taken on May 20, 1965 was normal (Tr. 79). On May 27, 1965, a total hysterectomy was performed on claimant (Tr. 75, 109).

After claimant's release from the hospital in June, 1965, she continued to receive outpatient treatment. The December, 1965 radiographic examination of her lumbosacral spine was negative (Tr. 95). The orthopedist reported no fracture, abnormality, or other orthopedic problem (Tr. 97). A subsequent radiographic examination on March 11, 1966

disclosed normal functioning of the urinary tract (Tr. 99). On July 7, 1966, it was noted that claimant felt fine, that the result of a urinary glucose test was negative, and that she had gained weight (Tr. 102). The reports indicate that as of March 16, 1967 claimant had no complaints and no glycosuria (i.e. sugar in the urine) (Tr. 4). A radiographic examination of her chest conducted on June 23, 1967 revealed only a slight increase in pulmonary marking and minimal enlargement of the heart (Tr. 105). Examination of claimant's left hand revealed no pathology. Subsequently, on or about June 30, 1969, claimant underwent minor surgery for the removal of a lipoma on the third finger of her left hand. Analysis of the specimen removed indicated that the lipoma was benign (Tr. 109-10).

Medical reports of claimant's treatment at the New York Diabetes Association from July, 1965 through December 12, 1969 revealed that she was treated for a diabetic condition (Tr. 111-20).

Claimant also received medical attention at the Long Island Jewish Hospital, where reports of her outpatient visits from December 19, 1969 through January 8, 1971 reveal that claimant continued to complain of dizziness (Tr. 121-36). However, the results of an electrocardiogram, electroencephlogram, and skull X-rays were within normal limits (Tr. 125, 127, 128). In January, 1970, claimant's diabetes was found to be under good control (Tr. 124).

In February, 1970, a tentative diagnosis of peripheral neuropathy possibly due to diabetes mellitus was noted. However, claimant's blood pressure (120/60 lying down, 120/62 sitting, and 110/70 standing), was considered within normal limits, and there was no significant impairment of vision (Tr. 129). An X-ray of the cervical spine showed only minimal narrowing of the C2 and C3 joint spaces. It was also noted that claimant had never taken insulin intravenously (Tr. 129). On May 15, 1970, the hospital records show that claimant's dizziness had improved, no other difficulties were reported, and her diabetic condition was stable (Tr. 132). In the report dated May 21, 1971, it was recorded that claimant's diabetic condition was under good control, and that another examination of the cervical spine showed only minimal narrowing of the C2 and C3 joint spaces (Tr. 134).

3. Vocational and Other Non-Medical Evidence

Claimant, who is in her late fifties, completed the third grade in school, and worked for the greater part of her adult life as a domestic (Tr. 25, 27, 44). She is approximately five feet tall and weighs about 180 pounds (Tr. 25). Claimant is married, but separated from her husband. Her four children are all married (Tr. 25).

At the hearing, claimant testified that from 1950 to 1960 she worked as a maid. She last worked in May, 1965 (Tr. 27-28). Claimant stated that she falls frequently

and suffers from dizzy spells (Tr. 28). She testified that she is able to tend to her personal needs and prepare meals (Tr. 30), but that her married daughter does the housework (Tr. 31).

Claimant was also questioned by Mr. Fredrick A. Santo, an employee of the New York City Department of Social Services, who represented claimant at the hearing (Tr. 15). Under questioning by Mr. Santo, claimant related that she had ceased working in May, 1965 after having undergone a hysterectomy (Tr. 35). It was also disclosed that due to a prior injury three fingers had been amputated from her right hand. However, claimant stated that the loss of the fingers had not interfered with her ability to work as a domestic (Tr. 39).

Since 1967, claimant has received by-weekly welfare benefits of \$109.50 from the City of New York. Her employment records demonstrate that she last met the special earning requirements of the Act on June 30, 1970 (Tr. 62). ^{3/}

4. The Administrative Decision

On the foregoing record, the administrative law judge concluded that claimant had not established that as of

^{3/} Additional evidence not presented to the administrative law judge, was submitted to the Appeals Council in connection with claimant's petition for review. This evidence consisted of the history sheets of the City of New York Department of Welfare pertaining to claimant (Tr. 138-41); her application to New York City for public assistance (Tr. 142-44), and, a statement of Mary Ann Deans, claimant's daughter, dated January 5, 1973 (Tr. 145).

June 30, 1970 (the date she last satisfied the insured status requirements of the Act) an inability to engage in substantial gainful activity, since she had the residual capacity to engage in her former occupation (Tr. 14). He found that claimant's impairments were not either singularly or combination, of such severity as to be disabling within the meaning of the Act.^{4/} The Appeals Council upon reviewing all the evidence (including the additional evidence submitted (see note 3, supra)) and concluding that the administrative law judge's decision was correct, denied claimant's request for review (Tr. 4).

^{4/} The administrative law judge's evaluation of the medical evidence was that (Tr. 13).

The claimant has a history of diabetes mellitus which is under good control and has not resulted in any diabetic complication. Further, the evidence reveals this condition has not resulted in any diabetic complication. The lumbo-sacro spine x-ray, was negative and the cervical spine x-ray was essentially negative. The orthopedic medical examiner found no orthopedic problems. The complaint of dizziness is not supported by medical evidence. However, in any event, references have been made in [the] medical record that the dizziness has improved. Further, the electroencephalogram and skull x-rays are not incapacitating. The undersigned carefully observed claimant throughout the course of the hearing. She did not appear in any pain, discomfort, or distress; and she walked without difficulty.

Accordingly, the administrative law judge's decision became the final decision of the Secretary.

B. District Court Decision

Thereafter, claimant instituted this action in the district court, seeking review of the Secretary's adverse decision. Noting that its review of a case arising under the Social Security Act was limited to determining whether the Secretary's findings of fact are supported by substantial evidence, the court "after consideration of the record, arguments, and applicable law", concluded that there was "ample substantial evidence to justify the administrative determination." (Add. 2b-3b). Accordingly, the court affirmed the denial of benefits, and granted the Secretary's motion for a judgment of the pleadings (Add. 3b).

STATUTE INVOLVED

The relevant provisions of the Social Security Act, 42 U.S.C. 401, et seq., are reproduced infra, pp. 1a-2a.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT
THE SECRETARY'S DECISION DENYING CLAIMANT
DISABILITY BENEFITS WAS SUPPORTED BY
SUBSTANTIAL EVIDENCE.

A. Scope of Review

Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), expressly provides that the "findings of the

Secretary as to any fact, if supported by substantial evidence, shall be conclusive * * *." It is well established that this provision precludes the courts from trying Social Security cases de novo. See, e.g., Gold v. Secretary of HEW, 463 F.2d 38 (C.A. 2, 1972); Franklin v. Secretary of HEW, 393 F.2d 640 (C.A. 2, 1968); Ross v. Richardson, 440 F.2d 690 (C.A. 6, 1971). As recognized by the Court in Moon v. Celebreeze, 340 F.2d 926, 930 (C.A. 7, 1965), when the court's review findings of the Secretary,

the courts are limited to a determination of whether the record as a whole contains substantial evidence which supports the administrative decision. They may not resolve conflicts in the evidence. They may not decide questions of credibility. The Secretary's ultimate factual determinations stand if they are supported by such relevant evidence, when considered in the context of the entire record, as a reasonable mind might accept as adequate to support a conclusion.

Furthermore, the conclusiveness conferred by Section 205(g) on the administrative findings extends to the inferences and conclusions drawn therefrom. Henry v. Gardner, 381 F.2d 191 (C.A. 6, 1967), certiorari denied, 389 U.S. 993, rehearing denied, 389 U.S. 1060. Levine v. Gardner, 360 F.2d 727 (C.A. 2, 1966).

B. Standards of Disability Under the Social Security Act

In order to qualify for disability benefits under the Act, a claimant must sustain the burden of showing

that on or before the date he last met the insured status requirement of the Act he was unable "to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months * * *." 42 U.S.C. 423(d)(1)(A); Gold v. Secretary of HEW, supra, 463 F.2d at 41; Reyes Robles v. Finch, 409 F.2d 84 (C.A. 1, 1969). Congress has clarified the meaning of "physical or mental impairment" by defining it as

an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

42 U.S.C. 423(d)(3). The purpose of this provision, which was added in the 1967 Amendment was "to reemphasize the predominant importance of medical factors in the disability determination," and to make clear that "[s]tatements of the applicant or conclusions by others with respect to the nature or extent of impairments or disability do not establish the existence of disability unless they are supported by clinical or laboratory findings or other medically acceptable evidence confirming such statements or conclusions." S. Rep. No. 744, 90th Cong., 1st Sess., pp. 48-49 (1967), 1967 U.S. Code Cong. & Admin. News 2834, 2882-83; see also H.R. Rep. No. 544, 90th Cong., 1st

Sess., p. 30 (1967). In this connection it is clear that the mere presence of an impairment or impairments is not per se disabling. There must be proof of its disabling severity to warrant the award of benefits. Celebreeze v. O'Brient, 323 F.2d 989, 990 (C.A. 5, 1963).

The relevant factors, or elements of proof to be considered in determining disability are (1) the objective medical facts; (2) the diagnosis or medical opinions based on the facts, (3) claimant's educational and vocational background; and (4) subjective evidence of pain or disability. Gold v. Secretary of HEW, supra, 463 F.2d at 41 n. 2; Underwood v. Ribicoff, 298 F.2d 850 (C.A. 4, 1962). However, subjective evidence alone is insufficient to support a disability determination. Reyes Robles v. Finch, supra, 409 F.2d at 87.

Thus, Section 223(d)(2) of the Act, 42 U.S.C. 423(d)(2) provides:

(A) and individual * * * shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any kind of substantial gainful work which exists in the national economy regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work * * * . "[W]ork which exists

in the national economy" means work which exists in significant numbers either in the region where [an] individual lives or in several regions of the country. [Emphasis added]

The legislative history reveals that Congress intended to make it clear "that if, despite his impairment or impairments, an individual still can do his previous work, he is not under a disability * * *." H.R. Rep. No. 544, 90th Cong., 1st Sess., p. 30 (1967). (Emphasis added). Or if, despite those impairments, the individual has the ability to engage in "some other type of substantial gainful work that exists in the national economy even though he cannot do his previous work, he also is not under a disability * * *." Id.

C. The Secretary's Decision is Supported by Substantial Evidence.

The Secretary's decision denying claimant disability benefits is clearly supported by substantial evidence. The medical evidence demonstrates that although claimant was suffering from various ailments on or before June 30, 1970 (the day she last satisfied the insured status requirement of the Act), they were not of sufficient severity, either singularly or in combination, to prevent her from performing her former occupation as a domestic; and, therefore, she was capable of engaging in substantial

gainful activity. Accordingly, the Secretary's decision should be affirmed. ^{5/}

5/ Claimant also contends that at the very least this case should be remanded since the record developed during the administrative proceedings did not collect "all the available relevant evidence of disability to assist the Secretary in making a fair and valid decision" (Br. 24). Specifically, claimant argues that the administrative proceedings did not elicit subjective evidence concerning her condition, or any difficulty she had experienced performing her past employment. However, the transcript of the hearing discloses that subjective evidence was elicited (see Tr. 29, 30, 33). Also, the administrative law judge observed claimant at the hearing and noted that she did not appear in pain, discomfort or distress (Tr. 13).

Furthermore, claimant refers to her lack of representation by counsel at the hearing. However, hearings on disability claims are not adversary proceedings, Richardson v. Perales, 402 U.S. 389, and absent a clear showing of prejudice or unfairness in the proceedings, lack of counsel is not a sufficient cause for remand. See Sykes v. Finch, 443 F.2d 192 (C.A. 7, 1971); Granger v. Finch, 425 F.2d 206 (C.A. 7, 1970). Here, while claimant was not represented by an attorney, a representative of the New York City Department of Social Services was present and assisted claimant at the hearing (Tr. 22, 35-43). He questioned claimant about her past employment (Tr. 37, 39) and elicited evidence of her subjective physical condition (Tr. 37-39).

Finally, claimant also contends that the remand is warranted since certain medical reports in the record are illegible. Although the reports reproduced are of poor quality, the administrative law judge's comprehensive discussion of the medical evidence (Tr. 11-13) reflects no difficulty in determining the contents of the reports, and claimant does not allege that relevant medical reports were not considered because they were illegible.

On appeal to this Court claimant contends that she is disabled because of her diabetes, loss of three fingers on her right hand, dizziness, menopause, obesity and back pains. However, a study of the medical evidence reveals that although claimant suffered from diabetes, the condition was under "good control" (Tr. 124, 139) and was not accompanied by any systemic complications resulting in the degeneration of nerves, circulatory impairment or visual deficiencies. The condition was clearly remedial, and thus not disabling. See Knox v. Finch, 427 F.2d 919 (C.A. 5, 1970), Purdham v. Celebrezze, 349 F.2d 828, 830 (C.A. 4, 1965).

Also, with respect to claimant's dizziness, the electroencephalogram and x-rays of her skull taken in February, 1970, were essentially normal (Tr. 127-28) and in May, 1970, the Long Island Jewish Hospital reported that the dizziness had improved (Tr. 132). Thus the objective medical evidence does not substantiate the claims that her dizziness was of sufficient severity to be incapacitating. Certainly, claimant's testimony unsupported by objective clinical evidence is insufficient to justify a disability award under the Social Security Act. Reyes Robles v. Finch, 409 F.2d 84, 87 (C.A. 1, 1969); Peterson v. Gardner, 391 F.2d 208 (C.A. 2, 1965).

Similarly, although claimant complained of back pain due to an arthritic condition, there is no medical

evidence that the pain was so severe that it imposed restrictions on her ability to engage in substantial gainful activity. An orthopedic examination in December, 1965 disclosed no problems (Tr. 95-97) and subsequent x-ray examinations of her lumbrosacral spine revealed only minimal narrowing of the intervertebral joint space (Tr. 134). Such evidence falls short of establishing a disabling arthritic condition, there being no evidence that it imposed significant restrictions on claimant's mobility, flexion and bending (Tr. 129). See Woods v. Finch, 428 F.2d 469 (C.A. 3, 1970); Durham v. Gardner, 392 F.2d 168 (C.A. 5, 1968).

Furthermore, while the medical record from Queens General Hospital report that claimant underwent a hysterectomy in May, 1965 (Tr. 75-110), there is no evidence of any complications arising from the surgery.

Finally, neither claimant's obesity nor loss of fingers significantly impaired her ability to engage in substantial gainful activity. Indeed, claimant testified that the loss of her fingers did not impair her ability to work and that she could work as fast as another woman doing the same job. The administrative law judge stated that he carefully observed claimant during the hearing, and that she did not appear in any pain, discomfort, or distress, and that she walked without difficulty (Tr. 13).

In short, while claimant was undoubtedly suffering from various ailments, the medical evidence does not support a conclusion that they were of sufficient severity to be disabling, but to the contrary supports the Secretary's finding that given claimant's age, education and vocational background she was able to engage in substantial gainful activity.

CONCLUSION

For the foregoing reasons the judgment of the district court should be affirmed.

Respectfully submitted,

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NOVEMBER, 1974.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 1974, I served the foregoing brief upon counsel for the appellatn by causing copies to be mailed, air mail, postage prepaid, to:

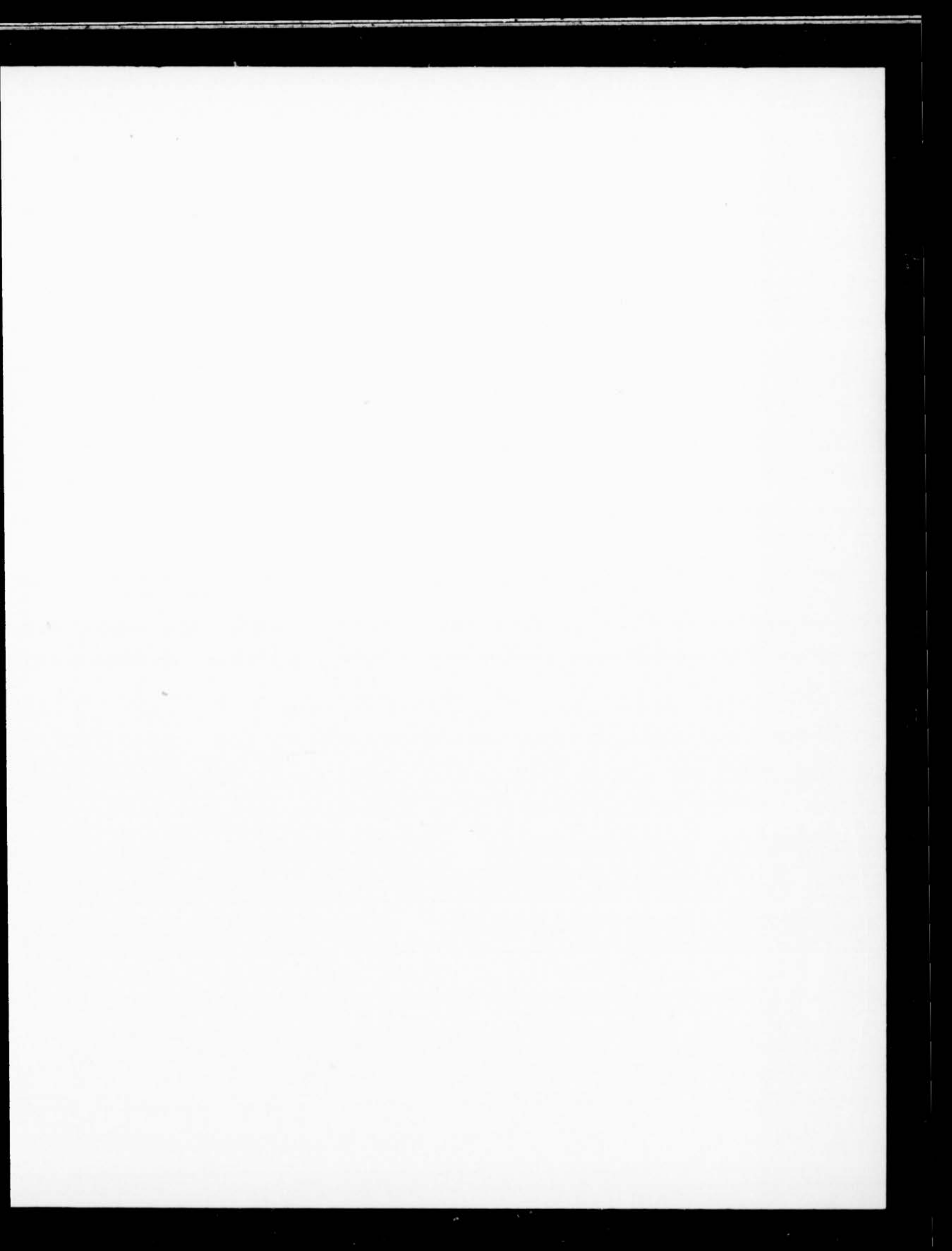
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S T A T U T O R Y A P P E N D I X



STATUTORY APPENDIX

Relevant sections of the Social Security Act, 42 U.S.C. (1970 ed.) 401, et seq., provide in pertinent part:

Section 205(g), 42 U.S.C. 405(g):

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. * * * As part of his answer the Secretary shall file a certified copy of the transcript of the record and decision complained of are based. The court shall have power to enter, upon the pleadings and modifying, or reversing the decision of the Secretary, with or without remanding the cause for rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive * * *.

* * * * *

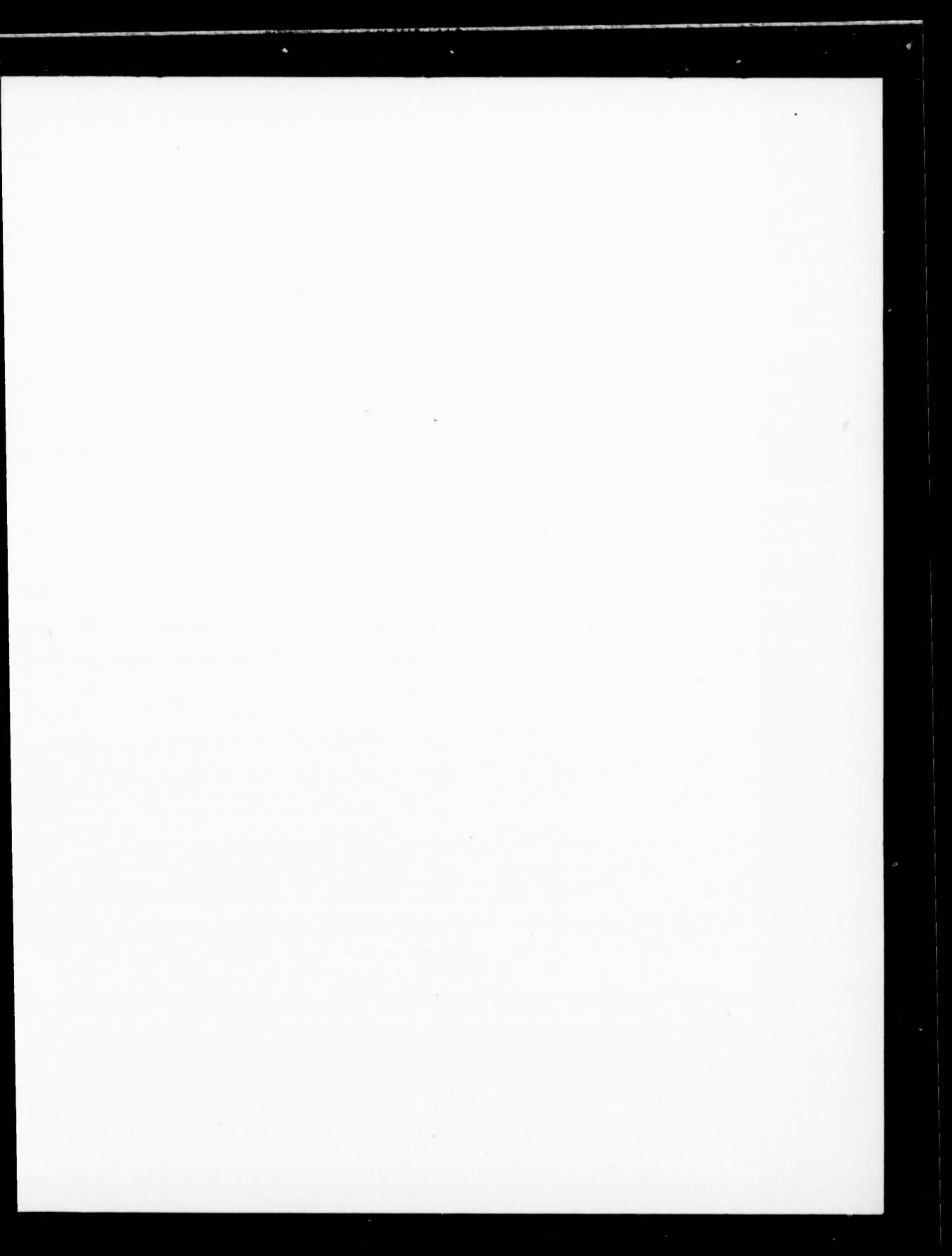
Section 223(d), 42 U.S.C. 423(d).

(1) the term "disability" means --

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months;

(2) for purposes of paragraph (1)(A) --

(A) an individual * * * shall be determined to be under a disability only if his physical or mental impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in



the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

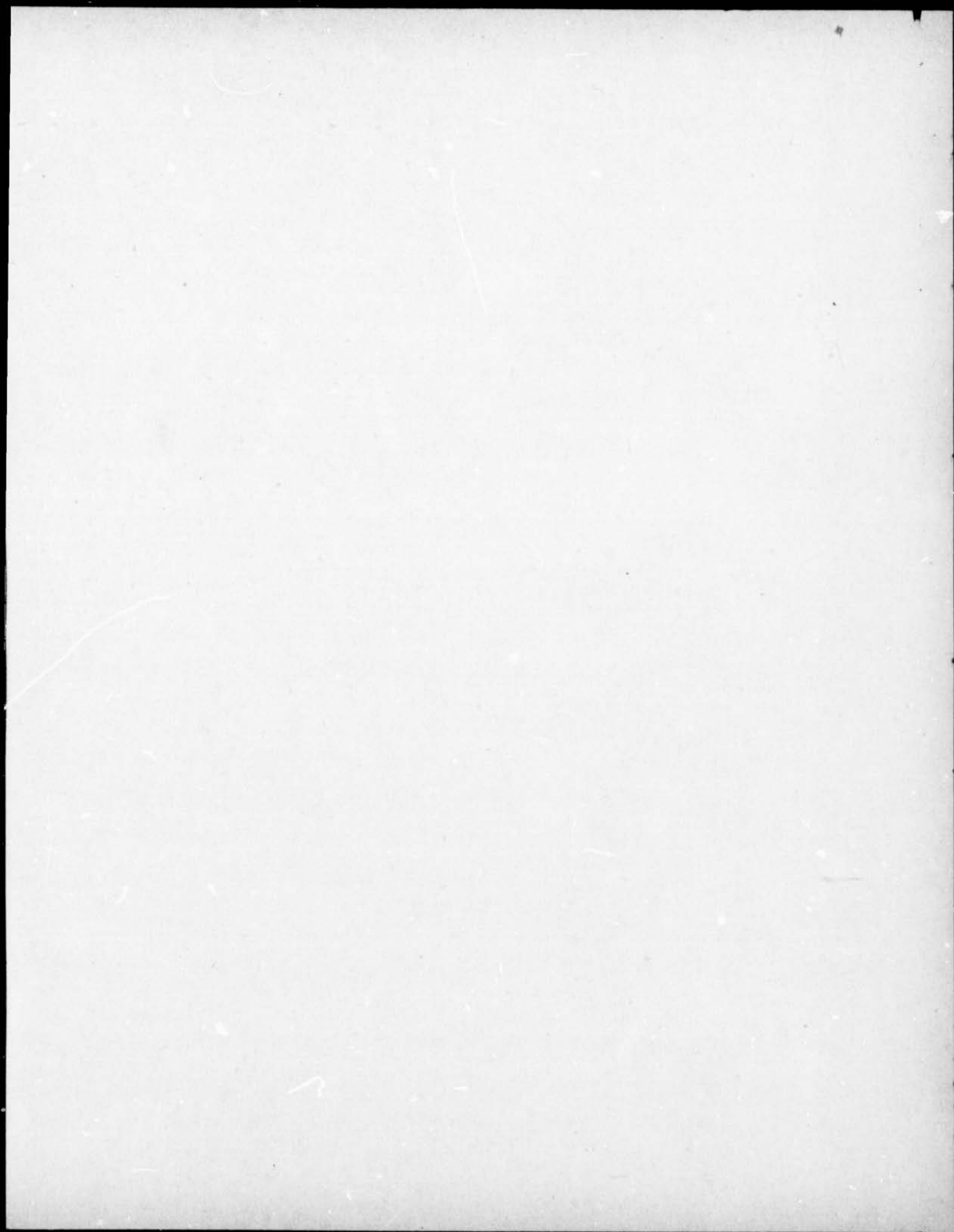
* * * * *

(3) for purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

* * * * *

(5) an individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require.

ADDENDUM





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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HAZEL CUTLER,

Plaintiff,

-against-

CASPER WEINBERGER, as Secretary of
the Department of Health, Education
and Welfare of the United States of
America,

Defendant.

No. 73 C 247

January 7, 1974

Appearances:

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Attorney for Plaintiff

EDWARD J. BOYD, ESQ.
United States Attorney
Eastern District of New York
Attorney for Defendant
By: GEORGE H. WELLER, ESQ.
Assistant U. S. Attorney

BRUCHHAUSEN, D. J.

Each of the parties move for an order to enter
judgment on the pleadings, pursuant to Rule 12(c) of the
Federal Rules of Civil Procedure.

This action was commenced, pursuant to 42 U.S.C.A. 405(g), for a judicial review of the final decision of the Secretary of Health, Education and Welfare. The Secretary's authorized representative conducted hearings and ruled that the claimant was not entitled to a period of disability or to disability insurance benefits under sections 216(i) and 223 of the Social Security Act. The Appeals Council of the Social Security Administration, by letter dated February 6, 1973, affirmed the decision of the hearing examiner. The plaintiff exhausted all administrative appeals, and now seeks a judicial review.

The Congress of the United States in its enactment of the Statute, has limited the power of a District Court to a review of the proceedings, had before the Social Security Administration. The governing Statute, 42 U.S.C.A. 405(g), states:

"The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive ****."

See Price v. Folsom, 168 F. Supp. 392, affirmed 280 F.2d 956, certiorari denied 365 U.S. 817; Easttam v.

Secretary of Health, Education and Welfare, 364 F.2d 509 (1966); Richardson v. Perales, 402 U.S. 389.

The Court, after consideration of the record, arguments, and applicable law, concludes that there was ample substantial evidence to justify the administrative determination.

The plaintiff's motion is denied.

The motion of the defendant is granted and it is hereby ordered that judgment on the pleadings in favor of the defendant be and the same is hereby granted and entered.

It is so ordered.

Copies hereof have been forwarded to the respective attorneys.

Walter Bruchhausen
Senior U. S. D. J.